(22,407)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 171.

TRUMAN R. HAWLEY, PLAINTIFF IN ERROR,

vs.

THE CITY OF MALDEN.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 25, 1912.

1 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

In the Superior Court within and for the County of Middlesex, in the Year of Our Lord One Thousand Nine Hundred and Ten.

Truman R. Hawley of Malden in our County of Middlesex, plaintiff, vs. The Inhabitants of the City of Malden in said County, defendants. In an action of contract. First Count: And the plaintiff says that since January 1, 1908, continuously to the present time said plaintiff has been an inhabitant of, and has had his domicil in, the city of Malden, in the County of Middlesex and Commonwealth of Massachusetts; that prior to May 1st, 1908, said plaintiff became, and on said May 1st and thereafter was, the absolute owner of nine certain shares of the common stock of the Chicago and Northwestern Railway Company, a corporation duly organized under the laws of the State of Illinois, of the par value of one hundred dollars each, was registered as owner on the books of said Railway Company, and held at said Malden a certificate of said stock duly issued by said Railway Company; that on or about said May 1st the said City of Malden, through its duly authorized agents, assessed said nine shares of stock to said plaintiff at their full value, to wit, thirteen hundred and fifty (1350) dollars, and thereafter, through its agents as aforesaid, levied a tax upon said shares of stock in the sum of twenty-five and 92/100 (25.92) dollars, and on or about September 1st,
2 1908, called upon and thereafter summoned said plaintiff to pay the same; that the said City of Malden in said assessment levy and summons acted in full compliance with the statutes of the Commonwealth of Massachusetts; that said plaintiff did on February 6th, 1909, pay the said tax under protest in writing in full compliance with section 86 of chapter 13 of the Revised Laws of Massachusetts, together with interest and other charges; that since said payment said plaintiff has continually demanded of said City of Malden the re-payment of said sum of twenty-five and 92/100 (25.92) dollars and said interest and other charges, but that said City of Malden has always refused and still continues to refuse to make said re-payment; that the said Railway Company has a principal office in Chicago, in said Illinois, and other offices in New York City, in the State of New York, and does business and owns property in various states of the United States, but that it has no office, does no business and owns no property in the said Commonwealth of Massachusetts. And the plaintiff claims as a matter of law that the statutes of the Commonwealth of Massachusetts under which said assessment levy summons and collection were made are unconstitutional and void, and that said assessment of said shares of stock and said levy and collection of said tax thereon by said City of Malden were illegal in that said statutes and said assessment levy and collection deprive the plaintiff of his property without due process of law, and deny him the equal protection of the law, contrary

to the provisions of the Constitution of the United States; wherefore the plaintiff says that said City of Malden owes said plaintiff the said sum of twenty-five and 92/100 (25.92) dollars.

3 Second Count. The plaintiff says that since January 1, 1908, continuously to the present time said plaintiff has been an inhabitant of, and has had his domicil in, the City of Malden, in the County of Middlesex and Commonwealth of Massachusetts; that prior to May 1st, 1908, said plaintiff became, and on said May 1st and thereafter was the absolute owner of five certain shares of the common stock of the Southern Pacific Company, a corporation duly organized under the laws of Kentucky, of the par value of one hundred dollars each, was registered as owner on the books of said Railway Company, and held at said Malden a certificate of said stock duly issued by said Railway Company; that on or about said May 1st the said City of Malden, through its duly authorized agents, assessed said five shares of stock to said plaintiff at their full value, to wit, three hundred and ninety (390) dollars, and thereafter, through its agents as aforesaid, levied a tax upon said shares of stock in the sum of seven and 48/100 (7.48) dollars, and on or about September 1st, 1908, called upon and thereafter summoned said plaintiff to pay the same; that the said City of Malden in said assessment levy and summons acted in full compliance with the statutes of the Commonwealth of Massachusetts; that said plaintiff did on February 6th, 1909, pay the said tax under protest in writing, in full compliance with section 86 of chapter 13 of the Revised Laws of Massachusetts, together with interest and other charges; that since said payment said plaintiff has continuously demanded of said City of Malden the re-payment of said sum of seven and 48/100 dollars and said interest and other charges, but that said City of Malden has always

4 refused and still continues to refuse to make said re-payment; that the said Railway Company has a principal office in San Francisco and other offices in New York City in the State of New York, and does business and owns property in various states of the United States, but that it has no office, does no business, and owns no property in the said Commonwealth of Massachusetts. And the plaintiff claims as a matter of law that the statutes of the Commonwealth of Massachusetts under which said assessment levy summons and collection were made are unconstitutional and void, and that said assessment of said shares of stock and said levy and collection of said tax thereon by said City of Malden were illegal in that said statutes and said assessment levy and collection deprive the plaintiff of his property without due process of law, and deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States; wherefore the plaintiff says that said City of Malden owes said plaintiff the said sum of seven and 48/100 (7.48) dollars.

Third Count. The plaintiff says that since January 1, 1908, continuously to the present time, said plaintiff has been an inhabitant of, and has had his domicil in, the City of Malden, in the County of Middlesex and Commonwealth of Massachusetts; that prior to May 1st, 1908, said plaintiff became, and on said May 1st and thereafter

was, the absolute owner of fifteen certain shares of the common stock of the Copper Range Consolidated Company, a corporation duly organized under the laws of the State of New Jersey, of the par value of one hundred dollars each, was registered as owner on the books of said Copper Range Consolidated Company, and held
5 at said Malden a certificate of said stock duly issued by said Copper Range Consolidated Company; that on or about said May 1st the said City of Malden, through its duly authorized agents, assessed said fifteen shares of stock to said plaintiff at their full value, to wit, one thousand and eight and 75/100 (1008.75) dollars, and thereafter, through its agents as aforesaid, levied a tax upon said shares of stock in the sum of nineteen and 35/100 (19.35) dollars, and on or about September 1st, 1908, called upon and thereafter summoned said plaintiff to pay the same; that the said City of Malden in said assessment levy and summons acted in full compliance with the statutes of the Commonwealth of Massachusetts; that said plaintiff did, on February 6th, 1909, pay the said tax under protest in writing, in full compliance with section 86 of chapter 13 of the Revised Laws of Massachusetts, together with interest and other charges; that since said payment said plaintiff has continuously demanded of said City of Malden the re-payment of said sum of nineteen and 35/100 (19.35) dollars and said interest and other charges, but the said City of Malden has always refused and still refuses to make said re-payment; that the said Copper Range Consolidated Company has a principal office in Jersey City, New Jersey, and does a large part of its business in Michigan and other states in the United States, but does only a small part of its business and owns only a small part of its property in Massachusetts. And the plaintiff claims as a matter of law that the statutes of the Commonwealth of Massachusetts under which said assessment levy summons and collection were made are unconstitutional and void, and that said assessment of said shares of stock and said levy and collection of said tax thereon by said
6 said City of Malden were illegal in that said statutes and said assessment levy and collection deprive the plaintiff of his property without due process of law, and deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States; wherefore, the plaintiff says that said City of Malden owes said plaintiff the said sum of nineteen and 35/100 (19.35) dollars.

Fourth Count. The plaintiff says that since January 1, 1908, continuously to the present date, said plaintiff has been an inhabitant of, and has had his domicil in, the City of Malden, in the County of Middlesex and Commonwealth of Massachusetts; that prior to May 1st, 1908, said plaintiff became, and on said May 1st and thereafter was, the absolute owner of five certain shares of the common stock of the American Sugar Refining Company, a corporation duly organized under the laws of New Jersey, of the par value of one hundred dollars each, was registered as owner on the books of said American Sugar Refining Company, and held at said Malden a certificate of said stock, duly issued by said American Sugar Refining Company; that on or about said May 1st the said City of Mal-

den, through its duly authorized agents, assessed said five shares of stock to said plaintiff at their full value, to wit, six hundred and thirty-four and 35/100 (634.35) dollars, and thereafter, through its agents as aforesaid, levied a tax upon said shares of stock in the sum of twelve and 17/100 (12.17) dollars, and on or about September 1st, 1908, called upon and thereafter summoned said plaintiff to pay the same; that the said City of Malden in said assessment levy and summons acted in full compliance with the statutes of the Commonwealth of Massachusetts; that said plaintiff did, on February 6th, 1909, pay the said tax under protest in writing, in full compliance with section 86 of chapter 13 of the Revised Laws of Massachusetts, together with interest and other charges; that since said payment said plaintiff has continually demanded of said City of Malden the re-payment of said sum of twelve and 17/100 (12.17) dollars and said interest and other charges, but that said City of Malden has always refused and still continues to refuse to make said re-payment; that the said American Sugar Refining Company has a principal office for the transaction of its business in Jersey City, New Jersey, and another office in New York City, New York, and does business and owns property in various states of the United States and in Cuba, but does no business and owns no property in the said Commonwealth of Massachusetts. And the plaintiff claims as a matter of law that the statutes of the Commonwealth of Massachusetts under which said assessment levy summons and collection were made are unconstitutional and void, and that said assessment of said shares of stock and said levy and collection of said tax thereon by said City of Malden were illegal in that said statutes and said assessment levy and collection deprive the plaintiff of his property without due process of law, and deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States; wherefore the plaintiff says that said City of Malden owes said plaintiff the said sum of twelve and 17/100 (12.17) dollars.

Fifth Count. The plaintiff says that since January 1, 1908, continuously to the present time, said plaintiff has been an inhabitant of, and has had his domicil in, the City of Malden, in the County of Middlesex and Commonwealth of Massachusetts; that prior to May 1st, 1908, said plaintiff became, and on said May 1st, and thereafter was, the absolute owner of five certain shares of the common stock of the Northern Railroad of New Hampshire, a corporation duly organized under the laws of New Hampshire, of the par value of one hundred dollars each, was registered as owner on the books of said Northern Railroad of New Hampshire, and held at said Malden a certificate of said stock duly issued by said Northern Railroad of New Hampshire; that on or about said May 1st the said City of Malden, through its duly authorized agents, assessed said five shares of stock to said plaintiff at their full value, to wit, seven hundred and fifteen (715) dollars, and thereafter, through its agents as aforesaid, levied a tax upon said shares of stock in the sum of thirteen and 72/100 (13.72) dollars, and on or about September 1st, 1908, called upon and thereafter summoned said plaintiff to pay

the same; that the said City of Malden in said assessment levy and summons acted in full compliance with the statutes of the Commonwealth of Massachusetts; that said plaintiff did, on February 6th, 1909, pay the said tax under protest in writing in full compliance with section 86 of chapter 13 of the Revised Laws of Massachusetts, together with interest and other charges; that since said payment said plaintiff has continually demanded of said City of Malden the re-payment of said sum of thirteen and 72/100 (13.72) dollars and said interest and other charges, but that said City of Malden has always refused and still continues to refuse to make said re-payment; that the said Northern Railroad of New Hampshire has a principal office for the transaction of its business in Concord, New Hampshire, and owns a large amount of property in New Hampshire, but
9 does little business and owns only a small part of its property in the said Commonwealth of Massachusetts. And the plaintiff claims as a matter of law that the statutes of the Commonwealth of Massachusetts under which said assessment levy summons and collection were made are unconstitutional and void, and that said assessment of said shares of stock and said levy and collection of said tax thereon by said City of Malden were illegal in that said statutes and said assessment levy and collection deprive the plaintiff of his property without due process of law, and deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States; wherefore the plaintiff says that said City of Malden owes said plaintiff the said sum of thirteen and 72/100 (13.72) dollars. To the damage of the said plaintiff (as he says) the sum of one hundred and fifty dollars. The action was entered in this Court on the first Monday of May, A. D. 1909, and on the ninth day of June, A. D. 1909, the defendants filed their demurrer to said declaration as amended, which is as follows, to wit: And now come the defendants in the above entitled cause and demur to each and every allegation and count in the plaintiff's writ and amended declaration contained, and say that the said amended declaration and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the plaintiff to have his actions against the defendants, for that from the facts set forth in said amended declaration it does not appear that the assessment, levy and collection of the taxes which the plaintiff seeks to recover were unlawful and unconstitutional. Wherefore for want of a sufficient declaration the defendants pray judgment. On the ninth day of July, A. D. 1909, the said demurrer was sustained by consent
10 of parties and by order of Court. On the fourteenth day of said July, the said action was reported to the Supreme Judicial Court for said Commonwealth and on the eighth day of January, A. D. 1910, a receipt from said Supreme Judicial Court was filed in the case, in words following, to wit: Judgment for the defendants. It is therefore, on this seventh day of February, A. D. 1910, considered by the Court that the said Inhabitants of the City of Malden recover against the said Truman R. Hawley their costs of suit taxed at thirty-two dollars and sixty-three cents.

In testimony that the foregoing is a true copy of record, I here-

unto set my hand and affix the seal of said Court, this fourth day of November, A. D. 1910.

[Seal of The Superior Court.]

WM. C. DILLINGHAM,
Ass't Clerk.

11 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

TRUMAN R. HAWLEY, Plaintiff,
v.
CITY OF MALDEN, Defendant.

Application for Writ of Error.

To the Honorable the Chief Justice of the Superior Court:

Your petitioner, Truman R. Hawley, submits that heretofore, to wit, on the first Monday of February nineteen hundred and ten at Cambridge in an action in which your petitioner was plaintiff and the City of Malden was defendant, final judgment was rendered against your petitioner in the Superior Court within and for said County of Middlesex, being the highest court of law or equity of Massachusetts in which judgment could be rendered in said action, as appears by the record of said Superior Court. And your petitioner says that in the trial of said case there was drawn in question a right, privilege or exemption claimed under the Constitution of the United States and the decision was against the right, privilege or exemption claimed by the plaintiff, and a manifest error hath happened to the great damage of your petitioner.

Wherefore, your petitioner considering himself aggrieved by the final decision of the Superior Court in rendering judgment
12 against him in the above entitled case prays a Writ of Error from the said decision and judgment to the Supreme Court of the United States and an order fixing the amount of the bond to be filed by him.

Assignment of errors herewith.

COURTENAY CROCKER,
Attorney for the Plaintiff.

COMMONWEALTH OF MASSACHUSETTS,
Superior Court:

Let the writ of error issue upon the execution of a bond by Truman R. Hawley to the City of Malden for five hundred dollars.

JOHN A. AIKEN,
Chief Justice of the Superior Court.

18 [Endorsed:] Petition for Writ.

14 In the Supreme Court of the United States.

At Law.

TRUMAN R. HAWLEY, Plaintiff in Error,
v.
CITY OF MALDEN, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the plaintiff in error in the above named case, and says that there are errors in the records and proceedings of the above entitled case, and in the judgment of the Superior Court of Massachusetts for the county of Middlesex, and for the purposes of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

(1) That the said court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which the City of Malden assessed and collected a tax on the full value of the plaintiff's nine shares of common stock of the Chicago and Northwestern Railway Company, a corporation duly organized under the laws of the State of Illinois and having a principal office in Chicago, Illinois, and other offices in New York City, in the State of New York, and doing business and owning property in various states of the United States, but having no office, doing no business, and owning no property in the Commonwealth of Massachusetts, did not deprive the plaintiff of his property without
15 due process of law or deny him the equal protection of the law contrary to the provisions of the Constitution of the United States, but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional.

(2) That the said Court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which the City of Malden assessed and collected a tax on the full value of the plaintiff's five shares of the common stock of the Southern Pacific Company, a corporation duly organized under the laws of the State of Kentucky, and having a principal office in San Francisco, California, and other offices in New York City, in the State of New York, and doing business and owning property in various states of the United States, but having no office, doing no business, and owning no property in the Commonwealth of Massachusetts, did not deprive the plaintiff of his property without due process of law or deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States, but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional.

(3) That the said Court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which the City of Malden assessed and collected a tax on the full value of the plaintiff's fifteen shares of the common stock of the

Copper Range Consolidated Company, a corporation duly organized under the laws of the State of New Jersey, and having a principal office in Jersey City, New Jersey, and doing a large part of its
16 business in Michigan and other states in the United States, but doing only a small part of its business and owning only a small part of its property in the Commonwealth of Massachusetts, did not deprive the plaintiff of his property without due process of law or deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States, but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional.

(4) That the said Court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which the City of Malden assessed and collected a tax on the full value of the plaintiff's five shares of the common stock of the American Sugar Refining Company, a corporation duly organized under the laws of the State of New Jersey, and having a principal office in Jersey City, New Jersey, and another office in New York City, in the State of New York, and doing business and owning property in various states of the United States and in Cuba, but doing no business and owning no property in the Commonwealth of Massachusetts, did not deprive the plaintiff of his property without due process of law or deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States, but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional.

(5) That the said Court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which the City of Malden assessed and collected a tax on the full value of the plaintiff's five shares of the common
17 stock of the Northern Railroad of New Hampshire, a corporation duly organized under the laws of the State of New Hampshire, and having a principal office in Concord, New Hampshire, and owning a large amount of property in New Hampshire, but doing little business and owning only a small part of its property in the Commonwealth of Massachusetts, did not deprive the plaintiff of his property without due process of law or deny him the equal protection of the law contrary to the provisions of the Constitution of the United States but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional.

For which errors, the plaintiff, Truman R. Hawley, prays that the said judgment of the Superior Court be reversed, and that a judgment be rendered in favor of the plaintiff, and for costs.

COURTENAY CROCKER,
Attorney for the Plaintiff.

18 [Endorsed:] Truman R. Hawley, Plaintiff in error, v. City of Malden, Defendant in error. Assignment of errors and prayer for reversal.

19 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Cambridge, within and for the County of Middlesex, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Truman R. Hawley of Malden Plaintiff and the City of Malden a municipal corporation duly established under the laws of the Commonwealth of Massachusetts, Defendant, in an action to recover taxes paid under protest wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Truman R. Hawley as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable John M. Harlan, Associate Justice of the United States, the eleventh day of November in the year of our Lord one thousand nine hundred and ten.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States
District of Massachusetts.

Allowed by

JOHN A. AIKEN,
Chief Justice of the Superior Court.

20 [Endorsed:] Writ of Error.

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

And now, here, the Judges of the Superior Court for the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I William C. Dillingham Ass't Clerk of said Superior Court have hereto set my hand and the seal of said Court this fourteenth day of November A. D. 1910.

[Seal of The Superior Court.]

WM. C. DILLINGHAM,
Ass't Clerk.

21 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Malden a municipal corporation duly established under the laws of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the city of Washington, D. C., on the* twenty eighth day of November next, pursuant to a Writ of Error filed in the Clerk's Office of the† Superior Court of the Commonwealth of Massachusetts for the County of Middlesex wherein Truman R. Hawley of Malden in the Commonwealth of Massachusetts is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken Chief Justice of the Superior Court of the Commonwealth of Massachusetts this eleventh day of November, in the year of our Lord one thousand nine hundred and ten.

JOHN A. AIKEN,
Chief Justice of the Superior Court.

*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

22 [Endorsed:] Citation.

HAWLEY
v.
CITY OF MALDEN.

NOV. 11TH, 1910.

I attorney of record for the defendant in error in the above entitled case hereby acknowledge due service of the within citation and enter an appearance in the Supreme Court of the United States.

H. L. BOUTWELL,
City Solicitor and Attorney for the City of Malden.

23 Know all men by these presents, That we, Truman R. Hawley, of Malden as principal and Courtenay Crocker of Boston as surety are held and firmly bound unto The City of Malden in the full and just sum of five hundred (500) dollars to be paid to the said City of Malden its Attorney, Successors or Assigns; to which payment well and truly to be made we bind ourselves our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the 31st day of October in the year of our Lord one thousand nine hundred and ten.

Whereas lately at a sitting of the Superior Court of Massachusetts for the County of Middlesex in a suit depending in said Court between Truman R. Hawley plaintiff and the City of Malden defendant judgment was rendered against the said Truman R. Hawley and the said Truman R. Hawley having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Malden citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on Monday, the twenty-eighth day of November next:

Now the condition of the above obligation is such, that if the said Truman R. Hawley shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

TRUMAN R. HAWLEY. [SEAL.]
COURTENAY CROCKER. [SEAL.]

Signed, sealed in presence of
CHARLES F. DUTCH.

Approved:
JOHN A. AIKEN,
Chief Justice of the Superior Court.

The foregoing bond is hereby approved on behalf of the defendant in error.

H. L. BOUTWELL,
City Solicitor.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

On this 31st day of October 1910 before me personally ap-
24 peared Truman R. Hawley and Courtenay Crocker to me known to be the persons described in the within bond and each acknowledged that he executed said instrument as his free act and deed.

[NOTARIAL SEAL.] CHARLES F. DUTCH,
Notary Public.

I certify the foregoing to be a true copy of bond on file in said Superior Court.

In testimony whereof, I hereto set my hand and affix the seal of said Court this twenty-first day of November, A. D. 1910.

[Seal of The Superior Court.]

WM. C. DILLINGHAM,
Ass't Clerk.

[Endorsed:] 786/22407.

Endorsed on cover: File No. 22,407, Massachusetts Superior Court. Term No. 171. Truman R. Hawley, plaintiff in error, vs. The City of Malden. Filed November 17th, 1910. File No. 22,407.

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Supreme Court of the United States.

October Term, 1912.

No. 171.

TRUMAN R. HAWLEY,
PLAINTIFF IN ERROR,

v.

THE CITY OF MALDEN.

WRIT OF ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

I.

Statement of the Case.

From January 1, 1908, to the present time the plaintiff in error has been an inhabitant of and has had his domicile in the city of Malden in the county of Middlesex and commonwealth of Massachusetts.

The statutes of Massachusetts contained in 1908 the following provisions:

Revised Laws, c. 12, sec. 2:

> "All property real and personal situated within the Commonwealth, and all personal property of the inhabitants of the Commonwealth wherever situated, unless expressly exempted by law, shall be subject to taxation."

Sec. 4:

"Personal estate for the purpose of taxation shall include . . . Third, . . . stocks in . . . moneyed corporations, within or without this Commonwealth."

Sec. 23:

"All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of May. . . ."

On May 1, 1908, the plaintiff in error was the owner of shares of common stock in five corporations as follows:

Chicago and Northwestern Railway Company, a corporation organized under the laws of the state of Illinois, which has a principal office in Chicago and other offices in New York, and which does business and owns property in various states of the United States, but which has no office, does no business, and owns no property in Massachusetts, 9 shares.

Southern Pacific Company, a corporation organized under the laws of the commonwealth of Kentucky, which has a principal office in San Francisco and other offices in New York, and which does business and owns property in various states of the United States, but which has no office, and does no business, and owns no property in Massachusetts, 5 shares.

American Sugar Refining Company, a corporation organized under the laws of New Jersey, which has a principal office in Jersey City and another office in New York, and which does business and owns

property in various states of the United States and in Cuba, but which does no business and owns no property in Massachusetts, 5 shares

Copper Range Consolidated Company, a corporation organized under the laws of the state of New Jersey, which has a principal office in Jersey City, and which does a large part of its business in Michigan and other states in the United States, but which does only a small part of its business and has only a small part of its property in Massachusetts, 15 shares

Northern Railroad of New Hampshire, a corporation duly organized under the laws of the state of New Hampshire, which has a principal office in Concord, N.H., but which does little business and has only a small part of its property in Massachusetts, 5 shares.

On or about May 1, 1908, the city of Malden assessed these shares of stock to the plaintiff in error at their full value, namely, $1350, $390, $1008.75, $643.35, and $715, and levied taxes upon the same in the sums of $25.92, $7.48, $19.35, $12.17, and $13.72, respectively, and on February 6, 1909, the plaintiff in error paid said taxes, aggregating $78.64, under protest in writing.

The plaintiff in error thereupon, as permitted by the Massachusetts statutes (Record, pp. 1–5), brought an action of contract in the Superior Court for the county of Middlesex in the commonwealth of Massachusetts, to recover back the amounts so paid, setting forth the facts and claiming that the assessment and collection of these taxes, and the aforesaid statutes authorizing the same, were unconstitutional, void, and illegal, in that they deprived the plaintiff of his property without due process of law, and denied him the equal protection of

the law, contrary to the Constitution of the United States.

The defendant demurred to the plaintiff's declaration; the demurrer was sustained by consent of parties and by order of Court, and the case was reported to the Supreme Judicial Court for the commonwealth, which, on January 6, 1910, returned the case to the Superior Court for the entry of judgment for the defendant (see Record, p. 5, and *Hawley* v. *Malden*, 204 Mass. 138).

The Superior Court is (see Rev. Laws, c. 157, sec. 4, and Record, p. 6) the highest Court in Massachusetts in which final judgment can be entered in cases of this class arising in Middlesex county, and involving less than $1000 in amount. Final judgment was accordingly entered in said Court against the plaintiff in error on February 7, 1910 (Record, p. 5).

Whereupon the plaintiff in error petitioned the said Superior Court for a writ of error. The petition was duly allowed by said Court (Record, p. 6), and the case now comes before the Supreme Court of the United States upon the writ of error to the Superior Court for the commonwealth of Massachusetts (Record, pp. 7–12).

The assignment of errors (Record, pp. 7, 8) prays that the judgment of the Superior Court be reversed, and that a judgment be entered for the plaintiff in error, and for costs, upon the ground that in the case of each one of said five corporations said Court erred in its judgment and the rendition thereof, in that it decided, as matter of law, that the statutes under which the city of Malden assessed and collected a tax on the full value of the stock of the plaintiff in error did not deprive him of his property without due process of law,

or deny him the equal protection of the law, contrary to the Constitution of the United States.

The declaration in the case, the opinion of the Supreme Judicial Court in 204 Mass. 138, on pages 139–141, and the assignment of errors show that the plaintiff in error, at all stages of the case, has set up the contention that the taxes in question, and the law under which they were levied, deprived him of his property without due process of law, in violation of the provisions of the Constitution of the United States.

The five stocks involved fall into two classes: stock in foreign corporations (the Chicago & Northwestern Railway Company, the Southern Pacific Company, and the American Sugar Refining Company) which have no office, business, or property in Massachusetts; and stock in foreign corporations (the Copper Range Consolidated Company and the Northern Railroad of New Hampshire) which do a little business and have a small part of their property therein.

The sole question presented by the record which the plaintiff in error considers open under the decisions of the Supreme Court of the United States, and desires to argue, is whether the state of Massachusetts can tax the plaintiff in error upon the full market or capital value of his interest in the stock of either of these two classes of corporations without violating the *due-process clause* of the Fourteenth Amendment.

The plaintiff in error does not contend that the statutes in question violate the equal-protection clause of the Fourteenth Amendment, believing that question to have been passed on by this Court in *Kidd* v. *Alabama*,

188 U.S. 730, but desires to present the question, not yet decided by this Court, whether a state law which taxes a citizen upon stock owned by him in foreign corporations does not violate the due-process clause of the Fourteenth Amendment, in accordance with the decisions of this Court, holding that for a state to tax its citizens on property outside the state is to deprive them of their property without due process of law.

II.

The Question is still an Open One in this Court.

The question whether a tax by a state upon a resident thereof in respect of shares of stock owned by him in foreign corporations deprives him of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, because the property represented by the stock is not property within the state, has never been squarely presented to or decisively passed upon by the Supreme Court of the United States.

Several cases have come before the Court in which the legality of such a tax was involved, —

Sturges v. *Carter*, 114 U.S. 511;
Kidd v. *Alabama*, 188 U.S. 730;
Wright v. *L. & N. R.R.*, 195 U.S. 219;
Darnell v. *Indiana* (decided December 23, 1912), —

but in none of them was the claim pressed upon the Court that the taxation of shares of stock in foreign corporations was a violation of the due-process clause; in none of them had this question been presented to and passed upon by the lower Court; and none of them

can, we think, fairly be cited as a decision of this question.

***Sturges* v. *Carter*, 114 U.S. 511:**

This was a suit originally brought in the state Courts of Ohio to recover taxes from the defendant on shares of stock owned by him in a New York corporation which had some property and did some business in Ohio. The case was removed to the United States Court on the ground, we assume, that the defendant was not, at the date of the writ, a citizen of Ohio. In the Circuit Court judgment was entered for the plaintiff, and the defendant thereupon sued out a writ of error to this Court, which confirmed the judgment of the lower Court.

So far as the headnote, statement of the case, and opinion in 114 U.S. show, the case turned entirely upon the proper construction of certain Ohio statutes, upon the question whether one of them was in violation of a clause in the constitution of the state of Ohio, and upon the question whether, according to the Ohio statutes, as construed by the Courts of that state, shares of stock in foreign corporations were taxable in Ohio.

No federal question of any kind appears to have been raised, argued, or decided in either Court.

***Kidd* v. *Alabama*, 188 U.S. 730:**

This was a suit in the state Court of Alabama, by the state, against a citizen for taxes on shares of stock held by her in a foreign corporation. After final judgment by the state Court for the plaintiff the case was taken on writ of error to this Court, which affirmed the judgment of the state Court.

The only federal question presented by this case was whether the tax in question was in violation of the *equal-protection* clause of the Fourteenth Amendment, because by the Alabama laws shares of stock in foreign railroad corporations not doing business in the state were not taxed in the same manner as shares of stock in domestic railroads and shares of stock in foreign railroad companies doing business in the state. The general question whether the taxation of shares of stock owned by a resident in foreign corporations is a violation of the *due-process* clause of the Fourteenth Amendment *because these shares of stock are or represent property outside the state*, was not pleaded, argued, or decided in either Court. This is clear from the report and opinion in 188 U.S., from the record in the case, and from the briefs of counsel.

The record shows that the only federal questions raised by the defendant in the lower Court were those set forth in her first and third pleas, as follows:

> I. "If the laws of Alabama impose the tax claimed in this suit upon said shares of said railroad companies, the same are illegal and void and a violation of the Constitution of the United States and the Fourteenth Amendment thereof *in that there is no similar tax imposed by said laws upon the shares of domestic railroads or upon the shares of foreign railroad companies doing business in the State of Alabama*" (Record, p. 6).
>
> III. "And for further plea, the defendant says that the claim for taxes for which this suit is brought is in a large part for taxes on shares in the capital stock of foreign corporations . . . which

were not located in Alabama and did no business in Alabama and the shares in which were not subject to taxation . . . *because no similar taxes are imposed upon the shares of like domestic corporations doing business in the State of Alabama*, and the defendant pleads . . . the same are illegal and void under the Constitution of the United States and the Fourteenth Amendment thereof" (*ib.*).

The Supreme Court of Alabama having sustained a demurrer to these pleas, the defendant took the case to this Court by writ of error, alleging in her petition that the case involved "the validity of a statute of the State of Alabama on the ground of its being repugnant to the Constitution of the United States *as denying to defendant the equal protection of the laws;*" and relied in her assignment of error on the action of the Supreme Court of Alabama in sustaining the demurrer to the defendant's *first and third pleas* (see Record, p. 17).

At the argument in this Court neither side touched upon the due-process clause, or upon any federal question other than that set up by the plea. Counsel for the defendant in error asserted in his brief that the *only issue* presented by the case was whether the tax was void because of the failure of the Alabama laws to impose similar taxes upon like corporations doing business in the state of Alabama; and this was not denied in the brief of counsel for the plaintiff in error.

The Supreme Court of the United States held that a state was not bound, by the equal-protection clause of the Fourteenth Amendment, to impose its taxes proportionally or equally on all classes of property, and therefore that the law complained of was not repugnant to

the Constitution merely because it was confined to shares of stock in corporations of a specified class (see Opinion, p. 732).

As it is well settled that no federal question can be decided by this Court which has not been raised and decided in the lower Court (see *infra*, p. 24), and as the general question whether the taxation of shares of stock in foreign corporations is contrary to the due-process clause of the Constitution, or to some other principle of constitutional law, was not raised, considered, or decided in the lower Court, and was not even argued in this Court, there was nothing for the Court to do, so far as this general question was concerned, but to note that it was not before the Court.

The opinion of Mr. Justice HOLMES calls attention to the inability of the Court to decide the general question, in the following language:

> "If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem to us to have more logical force. . . . But the argument does not go to that extent, and, limited as it is, the proposition that the plaintiff in error is denied the equal protection of the laws for the reason which we have stated, strikes us as wholly without force. . . . we now are assuming the right to tax stock in foreign corporations to be conceded" (pp. 731, 732).

Nothing can be clearer than the statements of the Court in this case, that the general question of the constitutionality of such taxes (under the due-process clause,

or any other principle of constitutional law) was not presented, argued, or decided.

Wright v. *Louisville & Nashville R.R.*, 195 U.S. 219:

This was a suit by the comptroller of the state of Georgia, in the United States Circuit Court of Georgia, to collect taxes from a foreign corporation, the Louisville & Nashville Railroad, which was bound as lessee of a Georgia corporation to pay the lessor's taxes, upon shares of stock in an Alabama corporation owned by the Georgia company.

The Circuit Court (see 116 Fed. Rep. 669) and the Circuit Court of Appeals (117 Fed. Rep. 1007) having decided the case in favor of the taxpayer, it was brought on certiorari to this Court, which reversed the judgment below.

So far as the reports show, the only question that was presented to or decided either by the Circuit Court, the Circuit Court of Appeals, or this Court, was whether a law authorizing such a tax was a violation of the constitution and statutes of the state of Georgia. The question whether such a law was a violation of the due-process clause of the federal Constitution was not presented to or argued before either Court; and it therefore could not have been decided, and was not decided, by either.

The tax laws of the state of Georgia directed the taxation of all property which could be taxed (see 195 U.S. 221, 222), and the question before the Court was whether the taxation of shares of stock in foreign corporations was justified under the state constitution, which provided that taxation should be uniform and ad valorem

on "all property *subject to be taxed within the territorial limits* of the authority levying the tax." As in all questions concerning the meaning of a state law or constitutional provision, the United States Courts adopt the construction of the state Court, —

> *Christy* v. *Pridgeon*, 4 Wall. 196;
> *Louisiana* v. *Pilsbury*, 105 U.S. 278, 294;
> *Bauserman* v. *Blunt*, 147 U.S. 647, 657;
> *Carstairs* v. *Cochran*, 193 U.S. 10, 16, and cases cited, —

and the question presented, therefore, was simply whether the phrase in the Georgia constitution had been, or would probably be, construed by the Courts of that state as including shares of stock in foreign corporations. This Court, in reversing the decision of the lower Courts and answering this question in the affirmative, did so on the ground (see 195 U.S. 220, 221) that on the whole the decisions of the state Court indicated that *it would hold* that shares of stock in foreign corporations were property "*subject to be taxed within the territorial limits*" of the state.

An examination of the record and briefs shows that in the original bill the railroad claimed that the tax was in violation both of the Georgia constitution and of the due-process and equal-protection clauses of the Fourteenth Amendment; but the federal objection appears not to have been pressed before the Circuit Court, as it is not mentioned in the opinion in 116 Fed. Rep. 669, which holds merely that the tax is contrary to the Georgia constitution as construed by the Courts of that state. From this decision the comptroller appealed to the Circuit Court of Appeals upon the sole ground that

the Circuit Court erred in its interpretation of the state constitution and of the decisions of the state Court relating thereto (Record, p. 27). Counsel for the railroad in the Circuit Court of Appeals even went so far as to disclaim any federal ground of complaint against the validity of the tax, saying, on page 14 of their brief:

> "We do not deny that Georgia could enact that the corporation should pay taxes on all their property. We, however, insist most confidently that Georgia has done no such a thing."

After being defeated in the Circuit Court of Appeals the comptroller filed a petition in this Court for a writ of certiorari on the sole ground that the Circuit Court and the Circuit Court of Appeals had misunderstood the purport of the decisions of the state Court. See petition and supporting brief. The "Response" of the railroad company to this petition suggests no federal question, and the supporting brief is confined to a discussion of the construction, under Georgia decisions, of the statutes and constitution of the state of Georgia.

The petition for certiorari was granted and the case was argued by counsel for the railroad before this Court upon the proposition ("Statement" for the Appellee, p. 5) that "no competent authority in the State of Georgia has *in fact* levied a tax" on the shares of stock in question.

No reference is made in the briefs in this Court to the question whether such taxes are obnoxious to the due-process clause of the Fourteenth Amendment. *Kidd* v. *Alabama* is referred to by both sides; but the scope of the decision in that case was misunderstood by

counsel, or at least by counsel for the railroad company, who wrongly assumes (Mr. Cummings' Brief, p. 22) that the Court had decided generally in that case that a state has the power to tax the shares of stock held by a resident in a foreign corporation.

Whatever may have been the understanding of counsel respecting the effect of the decision in 188 U.S. 730, the issue in *Wright* v. *L. & N. R.R.* is formally and correctly set forth on page 19 of the main brief for the respondents in this Court, as follows:

> "This case is not before this Court solely to determine, as in the Alabama case, whether the taxpayer has been denied its rights under the Constitution of the United States, but is here for this Court to pass, as fully upon the true meaning of the tax laws of Georgia and the liability of the taxpayer to pay taxes thereunder on the stock in question, as would the State Supreme Court itself, subject alone to the rule of decision that the decisions of the Supreme Court of Georgia construing her tax laws and declaring her public policy, will be accepted as conclusive by this Court."

The opinion of the Supreme Court of the United States contains no reference to any federal question except this sentence on pages 219, 220:

> "Taking into account the decision in *Kidd* v. *Alabama*, 188 U.S. 730, the power of the State to tax the shares *is not denied*, so far as the Constitution of the United States is concerned, *but it is argued* that the State has not attempted to use that power by its present constitution and laws."

The headnote to the case reads:

> "The constitution and laws of Georgia do not exempt from taxation shares of stock of a railroad corporation of another State held by a Georgia railroad corporation;"

and contains no indication that any other point was decided or considered.

That this case did not involve the due-process clause, or the general question of the rights of a state to tax shares of stock in foreign corporations, is further shown by the unsuccessful petition for a rehearing filed after the decision in 195 U.S., in which the railroad says (p. 2) that the power of the state to tax the shares in question under the federal Constitution was denied in the original bill of complaint, and (p. 3) that, in the brief filed for the company, counsel had claimed that the Georgia law "denies the *equal protection* of the laws to the owners of certain shares of stock *by taxing them while leaving the owners of other shares of stock untaxed.*" As this was the exact point raised and decided, adversely to the taxpayer, in *Kidd* v. *Alabama*; and as this was the only federal question the railroad claimed it had alleged, the question was of course covered by the decision in that case, and a rehearing was denied.

In the later case of *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127, the Georgia statutes under consideration in 195 U.S. were held a violation of the due-process clause of the Fourteenth Amendment, because not giving the taxpayer an opportunity to be heard as to the validity and amount of the assessment.

[For a case similar to *Wright* v. *R.R.*, where the Supreme Court decided that shares of stock in foreign

corporations were not taxable under state statutes and decisions, see *Mercantile Bank* v. *New York*, 121 U.S. 138.]

Indiana v. *Darnell*, U.S. Supreme Court, Dec. 23, 1912:

This was a suit in equity in the state Court of Indiana by the state to collect taxes from the defendants on shares of stock owned by them in a Tennessee corporation. A demurrer to a plea in abatement, which set up no federal question, was sustained (Record, pp. 24–28); and the defendants thereupon petitioned for removal of the cause to the United States Circuit Court for the District of Indiana, on the ground of diversity of citizenship, alleging also that the taxation of their shares of stock denied them the equal protection of the laws, and "under the guise of taxation takes property without due process of law," in violation of section 1 of the Fourteenth Amendment (Record, p. 29).

The petition for removal being denied, the defendants demurred to the bill of complaint, alleging (6) that the tax was "an *arbitrary discrimination* and in violation of Art. 1, Sec. 14 of the amendments to the Constitution of the United States," and (7) that it was "an *arbitrary discrimination against stock having its origin in a foreign state and in violation of the Commerce clause* (Sec. 8, Art. 1 of the Constitution of the United States)" (Record, p. 33). This demurrer having been overruled and judgment entered for the plaintiff, the defendants moved to set the judgment aside on the ground that the statute deprived them of their property without due process of law and denied to them the equal protection of the laws, "*they having been served*

by publication only and never having entered a general appearance" (Record, p. 35). This motion being overruled the defendants moved to modify the judgment as being in violation of the Fourteenth Amendment "in that it deprives the defendants of their property without due process of law and denies them the equal protection of the law, *said defendants having been served with process by publication only and not having appeared voluntarily or entered a general appearance"* (Record, p. 36). This motion was also overruled, and the defendants then appealed to the Supreme Court of Indiana; among the errors assigned being the denial of the petition for removal, the overruling of the demurrer, the overruling of the motion to set aside the judgment, and the overruling of the motion to modify the judgment (Record, p. 39).

The decision of the Supreme Court was in favor of the plaintiff (see 90 N.E. 769); and the defendants then took the case to this Court by writ of error, setting forth in their petition for a writ two specific errors only: (1) that the state Court decided that the statutes taxing their shares of stock "*did not discriminate against shares of stock in foreign corporations . . . so as to become a burden on interstate commerce*, and that said statutes were *not in conflict with Sec. 8, Art. 1* of the Constitution;" and (2) that the state Court decided that the statutes were "not in violation of Sec. 1 of the Fourteenth Amendment to the Constitution which provides as follows: 'Nor shall any state deny to any person within its jurisdiction *the equal protection of the laws*'" (Record, p. 50).

The assignment of errors, like the petition, contained only two specific allegations of error: (1) that the stat-

utes *discriminated* against the owner of foreign stocks so as to be a *burden on interstate commerce* and were in conflict with section 8 of article 1 of the federal Constitution, and (2) that they violated the *equal-protection* clause; but amplified the latter point by alleging that the violation of this clause consisted in discrimination between the taxation of shares of stock in foreign and domestic corporations (Record, pp. 55, 56).

Neither the petition nor the assignment of errors, nor the demurrer, nor either of the intervening motions, raised the question whether the statute was void under the due-process clause of the Fourteenth Amendment as attempting to tax property outside the state. The petition for a writ of error made no reference to the denial of the petition for removal, and, being granted, the first petition dropped out of the case.

It appears, therefore, that the only federal question presented to the Supreme Court of Indiana, or to this Court, in *Indiana* v. *Darnell*, was whether the alleged discrimination between foreign and domestic corporations rendered the tax complained of void under the equal-protection clause, or under the commerce clause; and that the general question whether the taxation of stock in foreign corporations violated the due-process clause was not before either Court. This is further shown by the following extracts from the briefs of counsel for the plaintiffs in error:

> "*We admit that these shares of stock were subject to taxation* and that for that purpose the equal protection clause of the Constitution permits classification" (Original Brief, p. 47).

> "The brief of the defendant in error is devoted

largely to establishing the fact that the property taxed was at rest, had become a part of the general mass of property in the State and that it was, therefore, subject to taxation. *This we have never denied and expressly admitted in our original brief"* (Supplemental Brief, p. 1).

The Supreme Court of the United States, in affirming the judgment of the Indiana Court in this case, had simply to rely upon the prior decision in *Kidd* v. *Alabama* to reach the conclusion that the statutes in question were not in violation of the equal-protection clause of the Fourteenth Amendment. The point that such laws were in violation of the commerce clause of the Constitution is not touched upon in the reasoning of the Court.

This case, considered as a *decision* of the Supreme Court of the United States, amounts simply to a re-affirmation of the proposition decided in *Kidd* v. *Alabama*, that the taxation of shares of stock in foreign corporations does not violate the equal-protection clause of the Fourteenth Amendment simply because shares of stock in other corporations are taxed by a different method; and to a decision that such statutes do not for this reason violate the commerce clause of the Constitution.

Summarizing the foregoing analysis of these four cases, it appears that in each of them shares of stock in foreign corporations were held by this Court, as a matter of fact, to be taxable at the domicile of the holder, and that some of the counsel engaged in these cases seem to have confused the equal-protection clause with

the due-process clause of the Fourteenth Amendment, and to have misunderstood the scope of the decision in *Kidd* v. *Alabama*.

On the other hand, none of these cases can fairly be cited as authority for the proposition that, as a matter of federal constitutional law, it is competent for a state to tax a resident upon shares of stock owned by him in foreign corporations; for in none of the cases was the issue presented to, or argued before, either the lower Court or this Court.

It is well settled that no question can be considered or decided in this Court which was not specifically called to the attention of, and decided by, the lower Court.

> *National Bank* v. *Commonwealth*, 9 Wall. 353, 363:

Here one of the points relied on in this Court, the violation of one of the provisions of a certain Act of Congress was not included in the four defenses set up in the state Court; and the Court says (p. 363) that it can only consider —

> "such alleged errors as are involved in the record, and actually received the consideration of the State Court," —

and that, in the case at bar, there was no reason to suppose that this defense was ever called to the attention of the state Court.

See also —

Edwards v. *Elliott*, 21 Wall. 532, 557.
Wilson v. *McNamee*, 102 U.S. 572, 574.
Morrison v. *Watson*, 154 U.S. 111, 115.

Erie R.R. Co. v. *Purdy*, 185 U.S. 148, 151.
Jacobi v. *Alabama*, 187 U.S. 133, 136.
Layton v. *Missouri*, 187 U.S. 356, 361.
Mutual Life Ins. Co. v. *McGrew*, 188 U.S. 291, 308.
C., I. & L. R.R. v. *Maguire*, 196 U.S. 128.
Hulbert v. *Chicago*, 202 U.S. 275, 281.
Cox v. *Texas*, 202 U.S. 446, 451, 452.
Osborne v. *Clark*, 204 U.S. 565, 568, 569.
Kansas City Star v. *Julian*, 215 U.S. 589.

In the case of *Erie R.R.* v. *Purdy* it was held that a claim in the state Court that a state law was repugnant to the commerce clause of the Federal Constitution would not justify the United States Supreme Court in considering or deciding a new claim set up in that Court for the first time — that the law violated the Fourteenth Amendment.

In *Cox* v. *Texas* it was held that a claim in the state Court that a state law was contrary to the equal-protection clause of the Fourteenth Amendment does not permit the United States Supreme Court to consider whether the statute in question violated any other provision of this amendment, or any other provision of the Constitution.

In *Osborne* v. *Clark* it was held by this Court that if a state law was attacked in the lower Court, merely as contrary to the state constitution, the question whether it was also contrary to some provision of the federal Constitution can not be decided by this Court, although it might have been raised in the Court below.

It makes no difference whether the case comes up from a state Court by writ of error, or from a lower federal Court. In either case the rule is the same.

Robinson v. *Belt*, 187 U.S. 41, was writ of error to the United States Circuit Court of Appeals, in a case originating in the United States District Court for the Indian Territory, and involved the validity of an assignment for the benefit of creditors. The assignment had been affirmed by the lower Court, and was attacked in this Court upon new grounds; but the Court refused to consider them, saying, page 50:

> "It is a sufficient answer to these objections to say that neither of them appears to have been called to the attention of the courts below. They do not seem to have been raised at the time the judgment was entered. It does not appear that any assignments of error were filed in the Court of Appeals for the Indian Territory, but the opinion states that plaintiffs relied upon four objections to the assignment as showing upon its face that it was fraudulent in law. No objection seems to have been raised in that court to the form of the judgment. In the assignments of error in the United States Court of Appeals for the Eighth Circuit no such question is raised and none alluded to in the opinion. Such objections could not be raised for the first time in this court."

See also —

Insurance Co. v. *Mordecai*, 22 How. 111, 117.

Wheeler v. *Sedgwick*, 94 U.S. 1, 3.

Clark v. *Fredericks*, 105 U.S. 4.
Jones v. *United States*, 179 Fed. Rep. 584, 592.

We believe that the precise ground of complaint against the taxation of shares of stock in foreign corporations — that all the property, franchises, and business represented by the shares are situated in another state, and that the membership in the corporation and the other rights represented by the certificates are enforceable only by the Courts of that state — has not been presented to this Court in any case, has certainly not been argued, and has not been passed on by this Court.

If, however, the plaintiff in error is mistaken in his understanding of the scope of the four decisions under consideration, and if it was the intention of the Court in one or more of them to hold that a state could tax a resident on shares of stock owned by him in foreign corporations, without violating the due-process clause of the Fourteenth Amendment, counsel respectfully, but earnestly, submit that a reargument of this question should be permitted in the case at bar.

III.

Analysis of the decisions of the Supreme Court of the United States upon the constitutionality of state tax laws.

1. A state law which violates directly, or by necessary operation, some specific provision of the federal Constitution is void.

Almy v. *California*, 24 How. 169.
Fairbanks v. *United States*, 181 U.S. 283; *per cur.*, at 294.

Thus a law is void which, through the taxation of the property, franchises, or operations of a national bank, or by taxing United States bonds, interferes with a necessary function or agency of the federal government established under the authority of the Constitution.

McCulloch v. *Maryland*, 4 Wheat. 316.
Osborn v. *United States Bank*, 9 Wheat. 738.
(The United States bank cases.)

Weston v. *Charleston*, 2 Peters, 449.
Bank of Commerce v. *New York*, 2 Bl. 620.
Bank Tax Case, 2 Wall. 200.
(Cases on United States bonds.)

And see—

Owensboro National Bank v. *Owensboro*, 173 U.S. 664, at 667, 668.

2. Congress has expressly provided (sec. 5219 of the Revised Statutes of the United States) that shares of stock in national banks, wherever held, shall be taxable in the state, and only in the state, where the bank is located, and this Court has sustained the validity of that provision; thus recognizing the propriety of taxing shares of stock in the state where the company is organized and does business.

People v. *Commissioners*, 4 Wall. 244.
National Bank v. *Commonwealth*, 9 Wall. 353.
Owensboro National Bank v. *Owensboro*, 173 U.S. 664, at 668.
Third National Bank v. *Stone*, and other cases, 174 U.S. 432–439.

Cleveland Trust Co. v. *Lander*, 184 U.S. 111.

See also —

Van Allen v. *Assessors*, 3 Wall. 573.
Bradley v. *People*, 4 Wall. 459.

3. Independently of the Fourteenth Amendment, a state law which attempts to tax property situated in another state is void on general principles, as that the state can have no jurisdiction over such property.

In the leading case of *McCulloch* v. *State of Maryland*, 4 Wheat. 316 (1819), holding that a state tax upon a branch of the United States Bank was unconstitutional, the Court takes occasion to discuss the general principles of taxation by the states, and the often-quoted opinion of MARSHALL, C.J., contains the statement, on page 429, that taxation is —

> "an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.
>
> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission."

In *Hayes* v. *Pacific Mail S.S. Co.*, 17 How. 596 (1854), it was held that vessels belonging to a New York corporation temporarily present in the state of California,

could not be taxed in the latter state. The Court, speaking through Mr. Justice NELSON, says, on page 599:

> "We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

In *St. Louis* v. *Ferry Co.*, 11 Wall. 423 (1870), it was held that ferry boats owned by an Illinois corporation, and operating across the Mississippi river, from East St. Louis in that state to the city of St. Louis in Missouri, could not be taxed in the state of Missouri.

The Court, speaking through Mr. Justice SWAYNE, says, on pages 429, 430:

> "It has been said that the power of taxation for the purposes of the commonwealth is a part of all governmental sovereignty and is inseparable from it. It is for the legislature to decide what persons and property shall be reached by the exercise of this function and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction. When called into activity there can be no limit to the degree of its exercise except what is found in the wisdom of the law-

making power and the operation of those conservative principles which lie at the foundation of all free government.

"Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *State Tax on Foreign Bonds*, 15 Wall. 300 (1872), the Court, in holding that after bonds had been issued by a Pennsylvania corporation the state could not provide for the taxation of the same when held by non-residents, proceeded, as explained by Mr. Justice FIELD, speaking for the Court, on page 319, upon the following general principles:

"Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction. . . .

"Property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition."

In *Morgan* v. *Parham*, 16 Wall. 471 (1872), it was held that the state of Alabama could not tax a vessel temporarily in that state but owned in the state of New York; the Court, speaking through Mr. Justice HUNT, saying:

> "the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value . . ." (p. 476).
>
> "The jurisdiction of this court over the present case, as in the case of *Hays* v. *The Pacific Mail Steamship Company*, arises from the facts, first that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and, secondly, that the vessel was lawfully engaged in the interstate trade, over the public waters" (p. 478).

Four out of these five cases involved taxes levied before July 28, 1868, the date of the adoption of the Fourteenth Amendment; and, while the adoption of this amendment appears to have preceded the tax involved in 15 Wall. 300, the amendment was not invoked or referred to in that case.

The decisions in the ship cases might have been the same if based merely upon the ground that the laws in question amounted to an interference with interstate commerce, and the decision in 15 Wall. may be supported on the ground that the tax in question was an

impairment of a contract, or on the ground that it was in effect an attempt to tax the person of a non-resident; but the Court, in all these cases, relies on a more general principle.

We have, in short, five decisions or opinions by this Court that, independently of the Fourteenth Amendment, state taxation must be confined to subjects within the territorial jurisdiction of the state; and there can be little doubt that if — to take what is always cited as the typical case of extra-territorial taxation — a tax on land owned by a resident but situated in another state, had come before the Court prior to 1868, the tax would have been held to be void, upon the general principles laid down in these cases.

Recent decisions of this Court reaffirm this doctrine, and leave no room to doubt that there is an underlying and inherent principle of constitutional law which will render void any attempt by a state to tax property not within its limits. Thus, in —

Louisville &c. Ferry Co. v. *Kentucky*, 188 U.S. 385, —

holding that one state can not tax a franchise owned by a resident but issued by another state, the Court, per Mr. Justice HARLAN, says of the general principle underlying the subject:

> "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government" (p. 396);

and refers to—

> "the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion" (p. 398).

The first of these statements by Mr. Justice HARLAN, as well as the statements quoted above from the opinions of the Court in the cases in 4 Wheat., 17 How., 11 Wall., and 16 Wall., are cited with approval by the Court, per Mr. Justice BROWN, in—

> *Union Transit Co.* v. *Kentucky*, 199 U.S. 194,—

where, at page 204, it is said that,—

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. . . ."

4. Since the adoption of the Fourteenth Amendment it is well established that for a state to tax property beyond its jurisdiction is to violate the due-process

clause of that amendment by depriving the owner of his property without due process of law.

Louisville &c. Ferry Co. v. *Kentucky*, 188 U.S. 385:

Here the Court, speaking through Mr. Justice HARLAN, says (p. 398):

> "Beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal situs in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana."

Delaware &c. R.R. v. *Pennsylvania*, 198 U.S. 341:

In this case it was held that a tax on the value of the capital stock of a domestic corporation can not include property which that corporation owns in other states. The Court, speaking through Mr. Justice PECKHAM, says:

> "The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment" (p. 358).

> "Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amendment, which prevents the taking of its property in that way" (p. 361).

See the remarks of the Court on these two cases in *Union Transit Co.* v. *Kentucky*, 199 U.S. 194, 209, 210.

In *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U.S. 395, the Court says, page 399, that property situated without the territorial jurisdiction of the state—

> "is beyond the state's taxing power, and the exaction of a tax upon it is in violation of the Fourteenth Amendment."

Western Union Telegraph Co. v. *Kansas*, 216 U.S. 1:

In this case it was held that a tax on a foreign corporation of a percentage on its entire capital, wherever situated, was, as to so much of its property as lay beyond the limits of the state, a violation of the due-process clause, the Court saying (p. 38):

> "It is firmly established that, consistently with the due process clause of the Constitution of the United States, a state cannot tax property located or existing permanently beyond its limits."

See also—

So. Pacific Co. v. *Kentucky*, 222 U.S. 63,—

where, on page 74, the Court refers to the principle that the taxation of property permanently located

elsewhere by the law of the domicile of the owner is a denial of due process and beyond the power of the state as resting "upon repeated judgments of this court."

The application of this principle to particular cases is discussed below, under 5 and 6.

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5. Coming now to the specific taxes which are regarded as violations of the due-process clause of the Fourteenth Amendment, we find that the following propositions have been laid down by this Court:

(a) Taxes can not be levied on land belonging to a resident but situated in another state.

We are not aware that any state has yet attempted to levy a tax of this sort, but the possibility is regarded by this Court as a typical case of unconstitutional taxation.

Thus in *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U.S. 385, the Court, speaking through Mr. Justice HARLAN, says that the tax involved in this case (a tax by Kentucky of a franchise granted by Indiana) was a deprivation of the property of the company without due process of law, in violation of the Fourteenth Amendment—

> "as much so as if the state taxed the real estate owned by that company in Indiana" (p. 398).

This statement, including the reference to foreign real estate as a typical case of unconstitutional taxation, is repeated by Mr. Justice PECKHAM, in speaking for the Court in *Delaware &c. R.R.* v. *Pennsylvania*, 198 U.S. 341, at page 360.

Then in *Union Transit Co.* v. *Kentucky*, 199 U.S. 194, in which it was held that a state could not tax a domestic corporation upon cars permanently employed outside the state, the Court based its opinion on the analogy between such personal property as railroad cars located outside the state and real estate situated outside the state, saying (p. 204):

> "The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction."

In the recent case of *Keeny* v. *New York*, 222 U.S. 525, holding that taxes on transfers intended to take effect at the death of the grantor are not taxes upon property, and are therefore not within the prohibition of the Fourteenth Amendment, the Court treats it as settled that real estate can only be taxed where it is, saying:

> "The real estate and tangible property in Texas were not within the taxing jurisdiction of the State of New York" (p. 537).

(*b*) Taxes can not be levied on tangible personal property belonging to a resident but which has acquired a permanent location or situs in another state, such as:

coal shipped out of the state for sale;

Delaware &c. R.R. v. *Pennsylvania*, 198 U.S. 341;

vessels permanently operated in some other state;

Old Dominion S.S. Co. v. *Virginia*, 198 U.S. 299; and—

railroad cars permanently employed in other states;

Union Transit Co. v. *Lynch*, 177 U.S. 149.
Union Transit Co. v. *Kentucky*, 199 U.S. 194.

The correlative proposition that such property may be taxed in the state where it is, although belonging to a non-resident, has been held —

as to vessels and machinery, in —

Gromer &c. v. *Standard Dredging Co.*, 224 U.S. 362;

as to coal shipped from another state for sale on account of a non-resident owner, in —

Brown v. *Houston*, 114 U.S. 622;
Pittsburg & S. Coal Co. v. *Bates*, 156 U.S. 577;

as to logs cut and lying in one state but owned by a resident in another state, in —

Coe v. *Errol*, 116 U.S. 517;
Diamond Match Co. v. *Ontonagon*, 188 U.S. 82;

as to mortgages on real estate, —

Savings Society v. *Multnomah Co.*, 169 U.S. 421;
Bristol v. *Washington County*, 177 U.S. 133; and —

as to liquors in bond, in —

Carstairs v. *Cochran*, 193 U.S. 10.
Thompson v. *Kentucky*, 209 U.S. 340.

Hannis Distilling Co. v. *Baltimore*, 216 U.S. 285.

See also —

American Steel & Wire Co. v. *Speed*, 192 U.S. 500.

The ground of decision in these cases is generally the same as in the cases previously cited, namely, that property of the kind in question can only be taxed in the state where it is physically located.

See also the general discussion of the subject in —

Pullman's Car Co. v. *Pennsylvania*, 141 U.S. 18, 22, 23;
Buck v. *Beach*, 206 U.S. 392, 400, 401.
Marye v. *B. & O. R.R.*, 127 U.S. 117, 123.
So. Pacific Co. v. *Kentucky*, 222 U.S. 63, 74.

(*c*) Taxes can not be levied on corporate franchises belonging to a resident but granted by the United States, —

California v. *Pacific R.R.*, 127 U.S. 1, 40, 41;

or by another state, —

Louisville &c. Ferry Co. v. *Kentucky*, 188 U.S. 385:

In this case it was held that the state of Kentucky could not tax a Kentucky corporation upon the value of a ferry franchise granted by the state of Indiana; this franchise being, as the Court says (p. 396):

"a property right and incorporeal hereditament which has its situs in Indiana."

On pages 396, 397, the Court discusses the general rule that a state can not tax property beyond its jurisdiction, refers to the difficulty in particular cases of determining the situs of personal property for purposes of taxation, but adds (p. 398):

> "No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal situs in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana."

This reasoning has been repeatedly cited with approval, and in *Delaware &c. R.R.* v. *Pennsylvania*, 198 U.S. 341, was made the main ground of a decision that tangible personal property, such as coal, could not be taxed to a resident if actually held in another state for sale (see pages 358–361).

These decisions show that in applying the rule that a state can not tax property not within its limits, the Court draws no distinction between tangible and intangible property.

As said by the Court in *Buck* v. *Beach*, 206 U.S. 392, 401:

> "the same rule applies to intangible property."

It is the situs of the property, if it has any, that controls, whatever its physical nature.

6. State taxes upon the property of a resident have been held not to violate the due-process clause, when the property consists:

(a) of tangible personal property, which is not permanently located or used in other states. So held as to —

vessels not permanently operated in other states, —

So. Pacific Co. v. *Kentucky*, 222 U.S. 63, and cases cited, pp. 68, 69, and —

railroad cars not permanently employed in other states, —

N.Y. C. & H.R. R.R. v. *Miller*, 202 U.S. 584, 596, 597, or —

(b) of debts due from residents of other states, whether secured by mortgage on property in another state, —

Kirtland v. *Hotchkiss*, 100 U.S. 491, —

or not, —

Bonaparte v. *Tax Court*, 104 U.S. 592 (foreign state bonds).

The application to matters of taxation of the principle that personal property follows the owner is, by the decisions, confined to these two kinds of property — to debts due from non-residents, and to tangible personal property which has not acquired a situs elsewhere. It is only in the case of these two kinds of property that the Court has actually held that an interest in property which may be regarded as in a sense, or to

some extent, foreign property may be taxed at the domicile of the owner.

The reason given is that all property ought to have a situs for taxation somewhere, and in the case of debts and of personal property which is not permanently located anywhere, there is no better way of doing substantial justice than to tax them in the domicile of the creditor or owner. It is thought that the selection of any other situs would create confusion, or at least more confusion than this one does, and that for these reasons the old rule, *mobilia sequuntur personam*, — a rule of law still in force for many purposes, — furnishes the best guide for the tax assessor.

7. It is, however, freely recognized that the rule *mobilia sequuntur personam* is a legal fiction; that it must always give way in matters of taxation to the facts of the case; and that it does not authorize the taxation at the domicile of the owner of property which, whether tangible or intangible, is actually located and protected in some other state. For the history of the rule *mobilia sequuntur personam*, in its limited application to the law of taxation, reference is made to —

Green v. *Van Buskirk*, 7 Wall. 139, 150.

St. Louis v. *Ferry Co.*, 11 Wall. 423, 430.

Pullman's Car Co. v. *Pennsylvania*, 141 U.S. 18, 22.

Adams Express Co. v. *Ohio*, 166 U.S. 185, 224.

Eidman v. *Martinez*, 184 U.S. 578, 581, 582.

Union Transit Co. v. *Kentucky*, 199 U.S. 194, 208.

Buck v. *Beach*, 206 U.S. 392, 400.
Liverpool &c. Ins. Co. v. *Assessors*, 221 U.S. 346, 354.

8. It would appear that some forms of indebtedness may be subject to taxation in two states.

It has been held that a debt secured by a mortgage upon real estate is taxable at the domicile of the holder as a debt, —

Kirtland v. *Hotchkiss*, 100 U.S. 491, —

but it has also been held to be taxable as an interest in land by the state in which the land is situated.

Savings Society v. *Multnomah County*, 169 U.S. 421.
New Orleans v. *Stempel*, 175 U.S. 309.
Bristol v. *Washington County*, 177 U.S. 133.

It is submitted, however, that if the mortgage is a mere lien on the land, unsupported by any note, bond, or personal indebtedness, it could not be taxed at the domicile of the holder, if a resident of another state.

Deposits of money and certain forms of credit may be so localized as to be subject to taxation in the state where the deposits are made or the credits given.

New Orleans v. *Stempel*, 175 U.S. 309.
Blackstone v. *Miller*, 188 U.S. 189.
Board of Assessors v. *Comptoir National*, 191 U.S. 388.
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U.S. 395.
Liverpool &c. Ins. Co. v. *Assessors*, 221 U.S. 346.

Whether such credits are also taxable as technical debts in the state of the creditor's domicile, is, since the latest statement of the Court upon the subject, to say the least, a matter of doubt. In the case cited from 221 U.S., Mr. Justice HUGHES, speaking for the Court, says (p. 354) that the question as to the right of taxation is "one of jurisdiction," and adds:

> "The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. *Blackstone* v. *Miller*, 188 U.S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

It is to be noted that in all the cases in which a tax on property has been upheld, although it is or may be taxed elsewhere, the property involved has been some form of debt. Ambulatory property like debts has little similarity with other forms of property, real or personal, tangible or intangible, which have a fixed situs or location; and although it has been said generally that personal property may have a double situs for taxation, no case can, we think, be found in which any item of tangible property, or any kind of intangible property other than a personal debt, has been held subject to taxation in two states.

While a state tax law is not brought within the prohibition of the due-process clause by the mere fact that the property involved may also be taxed, or be subject to taxation, by another state, or that it is taxed twice by the state in which it is situated, or that the tax is excessive or unjust, yet the Court holds to the general principle that double taxation —

> "is certainly not to be desired and ought, wherever possible, to be prevented" (*Buck* v. *Beach*, 206 U.S. 392, 408); —

and, as pointed out, the only property which has actually been held subject to taxation in two states is property in the form of debts.

9. A state can not reach for taxation property which itself is not subject to taxation, by means of a tax upon the documents which represent the property.

So held of an attempt by a state to levy a stamp duty upon bills of lading representing exports, —

Almy v. *California*, 24 How. 169, —

and also of a United States law levying a stamp tax on foreign bills of lading.

Fairbank v. *United States*, 181 U.S. 283.

In this case the Court says (p. 294) that a stamp duty on a bill of lading is in effect a duty on the article transported, and that what can not be done directly because of constitutional restriction, can not be effectuated indirectly by legislation which accomplishes the same result.

This doctrine is also applicable to property which is not taxable because its physical location is outside the territorial limits of the taxing state.

Thus a warehouse receipt for goods in another state can not be taxed by the state in which the holder is domiciled.

Selliger v. *Kentucky*, 213 U.S. 200.

So a mortgage note can not be taxed in a state where the property is not situated, and the owner is not domiciled, simply because the note happens to be there for safe keeping.

Buck v. *Beach*, 206 U.S. 392.

So where, under the principle noted *supra* (p. 42), a debt is taxable in some state other than the domicile of the creditor, it is not the state where the bond or note happens to be, but the state where the money represented by it has been invested, or where the rights of the creditor against the debtor are protected.

Metropolitan Life Ins. Co. v. *New Orleans*, 205 U.S. 395, 402.

Buck v. *Beach*, 206 U.S. 392.

In the case last cited the Court says (p. 406):

> "that it cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the state for taxation."

It seems clear that the same rule would be applied to deeds, mortgages (unsupported by a personal debt), and other instruments or evidences of title to property in another state.

10. If the property can not be taxed specifically because outside the state, it can not be reached indirectly, as by a general tax on the capital stock or property of a domestic corporation which would include the property outside the state.

In such cases the tax is void as to so much of the company's property as is situated outside the state.

So held as to a law taxing the capital stock of a domestic corporation owning coal in another state, —

Delaware &c. v. *Pennsylvania*, 198 U.S. 341, —

as to a law taxing the franchises of a domestic corporation which owns franchises granted by another state, —

Louisville &c. Ferry Co. v. *Kentucky*, 188 U.S. 385, —

and as to a law taxing a foreign corporation doing business in the state at a percentage of its entire capital wherever employed, —

Western Union Telegraph Co. v. *Kansas*, 216 U.S. 1.

11. The income from foreign property, including the interest on debts, the rents from real estate, and the dividends from corporate stock, becomes property within the state of the owner's domicile as soon as there received, and it must then be taxable by that state, irrespective of its origin, as money or cash on hand.

Union Transit Co. v. *Kentucky*, 199 U.S. 194, 204.

12. Some of the decisions which may be relied on by defendant in error relate to points which have no bearing upon the case at bar.

(*a*) The inheritance-tax decisions.

The cases upholding the right of the state of a decedent's domicile to levy an inheritance tax upon property outside the state are not in point; for such taxes are not taxes upon property, and therefore can not operate to deprive the citizen of his property without due process.

Buck v. *Beach*, 206 U.S. 392, 403.
Keeny v. *New York*, 222 U.S. 525, and cases cited.

(*b*) The taxation of domestic corporations.

Corporations are the creature of the state; and the latter, unless restrained under the contract clause of the constitution may tax their property, franchises, or capital in any way it sees fit,—

State Railroad Tax Cases, 92 U.S. 575;
Corry v. *Baltimore*, 196 U.S. 466,—

subject only to the principle, noted *supra*, that if the method of taxation adopted is on the property or

franchises of the corporation, it must be confined to property situated within the state, and to franchises granted by the state.

The numerous cases in which the exact legal nature of the various forms of taxation which the several states have imposed upon domestic corporations has been discussed do not, therefore, yield material for the case at bar — except the important principle that a state can not tax a domestic corporation on property owned by it outside the state, either *eo nomine* or by means of a general tax upon its property or franchises (*supra*, pp. 35, 48).

(*c*) The difference between the property, capital, or stock of a corporation and the shares of stock in the company held by individuals has been the frequent subject of comment by this Court. That these differences are many and great may be conceded.

> *National Bank* v. *Commonwealth*, 9 Wall. 353.
>
> *The Delaware Railroad Tax*, 18 Wall. 206.
>
> *Tappan* v. *Merchants' Natl. Bank*, 19 Wall. 490, at page 503:

"A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is

protected at the place where the bank transacts his business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government."

Farrington v. *Tennessee*, 95 U.S. 679.
Dewing v. *Perdicaries*, 96 U.S. 193.
Gibbons v. *Mahon*, 136 U.S. 558.
Jellenik v. *Huron Copper Co.*, 177 U.S. 1.

The true nature of corporation stock can not be expressed in a single short sentence. The common statement, for instance, that a shareholder's right is the right to participate in dividends and assets falls far short of an adequate description. Equally faulty is the statement (made, for instance, in the brief for the plaintiff in *Kidd* v. *Alabama*, 125 Ala. 418) that the shares in a corporation represent the property of the corporation. The fundamental right represented by a stock certificate is that of membership in the corporation, and this right involves the right to participate by vote in the management of the company's business, the right to share in the dividends declared, and the right to share in the assets of the corporation when its corporate life is ended.

IV.
Argument.

We submit with confidence that the foregoing analysis of the present state of the law points unerringly to the conclusion that a state tax upon a resident holder of a certificate of stock in a foreign corporation is a violation of the due-process clause, for the reason that the property and rights represented by the certificate are situated in, or granted and protected by, another state.

For the sake of simplicity the argument is, at this point, confined to cases in which the foreign corporation has no property and does no business in the state in which the owner is domiciled.

The adjudications of this Court show a division of property into two classes, one of which, consisting of debts and personal property not permanently located or protected in any jurisdiction, is sometimes taxable in the domicile of the owner, and one of which, consisting of tangible real and personal property situated in a foreign state, and of corporate franchises granted by a foreign state, is taxable only in the state where the property is.

In which class do shares of stock in foreign corporations fall?

Every consideration based upon the nature of the property leads to the conclusion that stock in foreign corporations belongs with those kinds of property which are taxable only in the state where they are situated, or created and protected; that is, in the state where the corporation is organized, has its property, and does its

business. The reasoning which has led the Court to hold that other kinds of foreign property or interests therein can not be taxed at the domicile of the owner necessarily involves a decision that corporation stock can be taxed to an individual holder only in the state in which the company is chartered, keeps its property, and does its business.

There is nothing in the domicile of the owner but a document or certificate representing rights of membership and property in a foreign corporation. The presence of this document no more creates a valid basis for taxation than does the possession of a deed of land in another state, or the possession of an engrossed grant of a franchise by a foreign state. As a matter of fact, a deed or charter is more closely identified with the property it represents than is a stock certificate, for the two former are the very origin of the owner's title, while the certificate is merely evidence of title.

Stock certificates should no more be substituted in purposes of taxation for the property they represent than should bills of lading, warehouse receipts, and other similar documents be taxed as representing the goods behind them. It is well settled that neither such documents nor the property interests represented by them can be taxed anywhere but where the property itself is (see cases *supra*, pp. 46, 47).

There is, we submit, such a complete analogy between such documents and stock certificates that the rules of taxation should be the same.

If we look beyond the document to the rights it represents, we find that these rights are protected by

other states and relate to property wholly situated in other states. Such rights do not differ from incorporeal or equitable rights in real and personal property situated in another state, which we assume could not be taxed except where located and protected.

The rights of membership in a foreign corporation are incorporeal and equitable rights in physical property situated in other states, and they should not be taxable at the domicile of the owner any more than easements of way, water-power rights, water-supply rights, interests under wills or trusts, or any other intangible or equitable interest in foreign property, real or personal.

We assume that a franchise granted by a state to an individual falls within the decisions noted *supra* (p. 40), holding that a franchise granted to a corporation can be taxed only in the state which grants it. This being so, what is the difference between franchises granted to individual non-residents — great numbers of which must have been issued by various states — and rights granted by a corporation charter to individual non-residents to become members of the corporation? Both rights rest in franchise.

We submit that the decision in *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U.S. 385, is as applicable to shares of stock in corporations created by a foreign state as to franchises issued by a foreign state. Both interests owe their existence to the action of the foreign state, which alone has the power to enforce and protect the rights created, and which alone should have the power of taxing them.

The reason why property physically situated in one state is not taxable elsewhere is said to be that taxation and protection are correlative incidents, and that if protection can be furnished only in the state where the property is situated, taxation must be confined to that state.

Tappan v. *Merchants Natl. Bank*, 19 Wall. 490, 501.

Union Transit Co. v. *Kentucky*, 199 U.S. 194, 204.

Liverpool &c. Ins. Co. v. *Assessors*, 221 U.S. 346, 356.

Upon this principle the taxing power should be confined to the state where the corporation is organized, for only in the Courts of that state can the holder of stock secure protection for his rights of membership. Certain rights — such, for instance, as the right to possession of the certificate — can, it is true, be protected or regulated by the state of the owner's domicile; but the same is true as to rights connected with the ownership of foreign real estate, foreign goods, and other extra-territorial property. Proceedings *in rem*, however, for the enforcement of the stockholder's rights, as such, can be brought only in the state of the company's origin, and it is only in that state and through its Courts that he can maintain his claims if disputed by the company or his fellow-members.

The analogy between shares of stock in foreign corporations and foreign realty, personalty, and franchises is again complete in the point here under discussion. Jurisdiction and protection being the decisive factors in the problem, shares of stock in corporations must be

held to be taxable only in the state where the corporation is organized and the rights of the shareholder are protected.

Counsel for the plaintiff in error have endeavored to anticipate the arguments that may be advanced on behalf of the defendant in error.

It is frequently said that a state may exercise the power of taxation over all property and persons within its jurisdiction, but this is not an accurate statement of the law. Jurisdiction for tax purposes over persons within the bounds of the state is limited by the decisions cited under III, sec. 4, to the taxation of such persons in respect of property situated within the state.

That stock in foreign corporations may be reached on execution or by bill in equity in the Courts of the owner's domicile is beside the case; for this is also true of interests in foreign real estate, of personal property situated outside the state, and of other kinds of property, or other rights admittedly beyond the taxing powers of the state. In all these cases, although the property itself can not be reached, the citizen's interest in it can; but repeated decisions of this Court show that this fact alone does not make such interests lawful subjects of taxation.

That certificates of stock may be the subject of larceny, of an action of trover, or of a *donatio mortis causa*, or are within the statute of frauds, does not make them a lawful subject of taxation, when the property and rights they represent are situated or enforceable in a foreign state, any more than in the similar case of warehouse receipts or bills of lading.

That the ownership of foreign stock may pass by assignment and delivery of the certificates is also immaterial; for the same is true of the property represented by bills of lading, warehouse receipts, deeds of land, franchise charters, and all other property situated in, or created by a foreign state, and represented by some formal instrument of title.

That shares of stock are for many purposes regarded as personal property, and subject to the law of the owner's domicile, as, for instance, in matters relating to wills, intestacy, dower, etc., is immaterial; for the same is true of tangible personal property wherever situated.

It is said that foreign-corporation stock is, or represents, the right to share in the dividends declared by the company. This, as pointed out (p. 51), is a very incomplete statement, but, taken as true, it does not advance the argument of the defendant in error, for the ownership of an interest in foreign real estate also involves the right to share in its income.

The main argument for the taxability of shares of stock in foreign corporations at the domicile of the owner appears to rest on the distinction between the stock or property of the corporation itself and the shares belonging to the stockholders (see *Hawley* v. *Malden*, 204 Mass. 138, 140).

That the stock or capital of a corporation, and the shares or membership rights of the individual holders, are not the same rights or property, either in quantity or in kind, may be conceded; but to assume that this proposition involves the consequence that while the stock of the corporation can be taxed only in the state of its domicile, and its property only where the property

is, the interest of the individual stockholder can also be taxed by the state of his domicile is a complete *non-sequitur*. To admit that there are different interests in the same property is not to admit that they may be taxed in different states. Admitting that the corporation and its stock are taxable in the state of incorporation, the question is whether the shares of stock can be taxed to the holder in another state, and to point out that different interests are involved does not advance the argument one way or the other. It might as well be argued that because a small equitable life interest in a large real-estate trust situated in another state is a different property from that of the trustees it can be taxed at the domicile of its owner, while the property itself could be taxed in the state where it lies.

Giving full weight to the rule that a tax on shares of stock in foreign corporations does not violate the equal-protection clause of the Fourteenth Amendment; understanding that such a tax is not void under the due-process clause or any other constitutional provision merely because the capital or property of the corporation is already taxed elsewhere, or is liable to be thus taxed; and assuming that the general question whether a tax of this character violates the due-process clause of the Fourteenth Amendment, has not been finally determined by this Court; the plaintiff in error submits, upon the authority of the decisions cited under III, *supra*, and on the strength of the foregoing arguments, that such a tax does violate the due-process clause, because it is a tax upon property or rights in property not situated within the limits of the taxing state.

As explained *supra*, the foregoing argument is confined, for the sake of simplicity, to the stocks owned by the plaintiff in error in the three foreign corporations which have no property and do no business in Massachusetts. As to the stock in the other two corporations, we submit that the same conclusions must be reached, although these companies have a small part of their property and do a small part of their business in that state. This part of their property and business can, without question, be taxed in Massachusetts.

The rest of their property, as well as the corporations themselves, are outside the state, and therefore shares of stock in them can not, we submit, be taxed in Massachusetts.

V.

Economic and Administrative Considerations.

If considerations of this order may be taken into account, counsel beg to submit the following points:

American economists are almost universally agreed that the attempt to tax shares of stock in foreign corporations upon their market value is unjust, unwise, and ineffective. For recent opinions by state tax commissioners and others to this effect, see the reports for 1907, 1908, 1909, 1910, 1911, and 1912 of the National and International Conferences on State and Local Taxation.

A typical example of the reports of various state commissions which in the last few years have investigated the recognized failure of the general property tax is given in the following extract from the 1910 report of the Wisconsin Tax Commission:

"With the almost universal disregard of the

law relating to the assessment of money and credits and the consequent unjust shifting of the tax burden to innocent shoulders . . . the commission repeats its recommendations that money and all classes of credits, including stock and bonds, be exempted from taxation, whatever may be the disposition of other classes of personal property."

And to a similar effect is the report in 1897 of the special Commission on Taxation in Massachusetts:

"We conclude that while, under present conditions, the difficulties of local assessment by different towns and cities within the State contribute much to the unsatisfactory working of the taxes on intangible property, this is not the root of the evil. The fundamental cause is the endeavor to tax securities, which are no more than evidences of ownership, or interest in property, and which offer the easiest means of concealment and evasion, by the same methods and at the same rate as tangible property situated on the spot.

"We propose, therefore, a radical change. We recommend that all securities and all evidences of debt, representing ownership or interest in property outside the State, be not subject to the general tax on property. This change would do away with all questions of double taxation, and with vexatious and insoluble administrative difficulties. It would make the legislation of the State on the various sorts of securities domestic and foreign, consistent with itself. It would relieve the assessors of a part of their duties which is always difficult and trying, and sometimes demoralizing. It would necessitate

> also further radical changes, in the way of substitutes for the present taxes on intangible personalty, — a subject to which we shall presently give the careful consideration it deserves."

Very few states succeed in securing any appreciable revenue from the taxation of shares of stock in foreign corporations, and several states now make no attempt to tax such property, at least when it is already taxed by the state in which the corporation is organized, the list already including New York, New Jersey, New Hampshire, Vermont, Connecticut, Wisconsin, and some other states.

It is believed that no European state but Switzerland has taxed such property for over a hundred years. Almost everywhere in Europe the owner pays a substantial tax upon his income from such property when received.

The substitution for the tax on market values of other taxes, such as a substantial tax on the income from shares of stock in foreign corporations, is to be expected throughout the states of the Union in the near future.

Such a tax on incomes would be fair, would violate no provision of the federal Constitution (*supra*, p. 49), and could be made in most of the states without amending the state constitution. In some states a constitutional amendment would probably be necessary; but, in view of the unproductiveness of the market-value tax, should be easy to pass.

In Massachusetts such an amendment is now before the legislature upon the recommendation of the governor.

No evil consequences of an administrative order are to be anticipated from a decision of the case at bar in favor of the plaintiff in error. The only effect of such a decision upon the tax system of a state which is getting any revenue from the taxation of shares of stock in foreign corporations will be to hasten the substitution of other fairer and more workable taxes, as on the income from such property.

It is apparent that there is some vital defect in a system of taxation which allows a farm in Illinois, owned by a resident of Massachusetts, to be taxed only in Illinois, but which allows the farm to be taxed at its full value in Illinois and the shares to be taxed at their full value in Massachusetts as soon as the farm is incorporated.

This defect has almost universally been recognized, and was forcibly called to public attention, as long ago as 1901, by the following resolution, adopted at the National Conference on Taxation held in Buffalo under the auspices of the National Civic Federation:

> "Resolved That this Conference recommend to the States the recognition and enforcement of the principles of interstate comity in taxation. These principles require that the same property should not be taxed at the same time by two state jurisdictions and to this end that if the title deeds or other paper evidences of the ownership of property, or of an interest in property, are taxed, they shall be taxed at the situs of the property and not elsewhere.
>
> "Resolved That the failure of the general property tax in its application to personal property is due to the inherent defects of its theory, that even

reasonably fair and effective administration is unattainable and that attempts to strengthen such administration simply accentuate the inequalities and unjust operation of the system."

We believe that we have called attention to the only effective means of putting an end to that defect, namely, for this Court to determine that for a state to tax its residents on shares of stock in foreign corporations is to deprive them of their property without due process of law, and that statutes attempting to impose such taxes are unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States.

We urge this decision because we believe that it is necessary to prevent injustice, that it is economically wise, and that it is in accordance with the provisions of the Constitution of the United States and the decisions of this Honorable Court.

Respectfully submitted,
COURTENAY CROCKER,
NATHAN MATTHEWS,
Counsel for the Plaintiff in Error.

(22,407)

Supreme Court of the United States.

No. 171. October Term, 1912.

TRUMAN R. HAWLEY, Plaintiff in Error,

v.

THE CITY OF MALDEN.

In Error to the Superior Court of the State of Massachusetts.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This is an action of contract to recover the amount of certain taxes assessed and collected by the defendant in error, hereinafter called the defendant, on certain shares of stock in certain foreign corporations, said taxes having been paid by the plaintiff in error, hereinafter called the plaintiff, under protest.

The declaration (Record, pp. 1–5) contains five counts, all containing substantially identical allegations, except as to the amounts claimed and the description of the shares of stock assessed.

The plaintiff alleges "as a matter of law that the statutes of the Commonwealth of Massachusetts under which said

assessment, levy, summons and collection were made are unconstitutional and void, and that said assessment of said shares of stock and said levy and collection of said tax thereon by said City of Malden were illegal in that said statutes and said assessment, levy and collection deprive the plaintiff of his property without due process of law and deny him the equal protection of the law, contrary to the provisions of the Constitution of the United States" (Record, pp. 1, 2, 3, 4, 5).

The plaintiff in each count of his declaration frankly admits that the defendant in said assessment, levy and summons acted in full compliance with the statutes of the Commonwealth of Massachusetts.

At the time of the assessment and levy of said taxes the plaintiff was an inhabitant of and had his domicil in said City of Malden (Record, pp. 1, 2, 3, 4).

To said declaration the defendant demurred (Record, p. 5) on the ground that "it does not appear that the assessment, levy and collection of the taxes which the plaintiff seeks to recover were unlawful and unconstitutional."

On the ninth day of July, A.D. 1909, the said demurrer was sustained by said Superior Court and on the fourteenth day of said July the said action was reported to the Supreme Judicial Court for said Commonwealth (Record, p. 5), and on the eighth day of January, A.D. 1910, a rescript from said Supreme Judicial Court was filed in the case directing that judgment be entered for the defendant (Record, p. 5).

This case comes before this Court upon a Writ of Error from the said Superior Court of the State of Massachusetts and the assignments of error, being five in number, cover separately each of the five counts of the declaration but raise substantially the same question, *i.e.*, that the Court below erred in deciding that the statutes of Massachusetts under which the defendant acted did not deprive the plaintiff of his property without due process of law or deny him the equal protection of the law contrary to the provisions of the Con-

stitution of the United States and that said statutes are valid and constitutional (Record, pp. 7, 8).

BRIEF OF ARGUMENT.

1. Only one question is raised for the consideration of this Court. That question is, — Are the statutes of the Commonwealth of Massachusetts authorizing the levying of a tax by a municipal corporation upon shares of the stock of foreign corporations owned by its inhabitants domiciled therein unconstitutional because contrary to the provisions of Article XIV., Sect. 1, of the Amendments to the Constitution of the United States? The Issue.

2. R.L., Chap. 12, Sect. 2, provides that, — Mass. Statutes.

"All property real and personal situated within the Commonwealth, and all personal property of the inhabitants of the Commonwealth wherever situated, unless expressly exempted by law, shall be subject to taxation."

Section 4 of said Chapter 12 provides that, —

"Personal estate for the purposes of taxation shall include: . . . Third, Public stocks and securities, bonds of railroads and street railways, stocks in turnpikes, bridges and moneyed corporations, within or without this Commonwealth, except as provided in section sixty-one of chapter fourteen."

Section 23 of said Chapter 12 provides that, —

"All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of May, except as provided in chapter fourteen and in the following clauses of this section. . . ."

3. This form of taxation of shares of the stock of foreign corporations owned by individuals has existed under the laws of Massachusetts for more than seventy years. Mass. Cases.

We find substantially the same provision derived from an earlier enactment, in Rev. Stats., Chap. 7, Sect. 4, and it has remained in force ever since. Its validity and constitutionality have been sustained by repeated decisions of the courts of Massachusetts covering a period of many years.

Great Barrington *v.* County Commissioners, 16 Pick. 572.

Dwight *v.* Mayor and Aldermen of Boston, 12 Allen, 316.

Frothingham *v.* Shaw, 175 Mass. 59, 61.

Hawley *v.* City of Malden, 204 Mass. 138.

Cases in other States.

4. A similar rule has been laid down in the decisions of the courts of many other States.

State *v.* Kidd, 125 Ala. 413.

Greenleaf *v.* Morgan County, 184 Ill. 226.

Seward *v.* City of Rising Sun, 79 Ind. 351.

Griffith *v.* Watson, 19 Kan. 23.

Appeal Tax Court *v.* Gill, 50 Md. 377.

Bacon *v.* State Tax Commissioners, 126 Mich. 22.

Ogden *v.* St. Joseph, 90 Mo. 522.

State *v.* Branin, 23 N.J.L. 484.

State *v.* Bentley, 23 N.J.L. 532.

Worth *v.* Commissioners of Ashe County, 82 N.C. 420.

Worthington *v.* Sebastian, 25 Ohio St. 1.

Bradley *v.* Bauder, 36 Ohio St. 28.

Lander *v.* Burke, 65 Ohio St. 532.

McKeen *v.* County of Northampton, 49 Pa. St. 519.

Whitesell *v.* County of Northampton, 49 Pa. St. 526.

Dyer *v.* Osborne, 11 R.I. 321.

Union Bank *v.* State, 9 Yerg. (Tenn.) 490.

Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600.

5. The Supreme Court of the United States has laid down the same rule, the constitutionality of the tax law, however, not being put in issue. U.S. Cases.

Sturges *v.* Carter, 114 U.S. 511.

Kidd *v.* Alabama, 188 U.S. 730.

Wright vs L. & N. R.R., 195 U.S. 219

Darnell vs Indiana (Dec. 23, 1912)

6. Unless constrained by the most cogent reasons this Court ought not to overturn a system of taxation which has been practised for so many years and repeatedly upheld by the courts of so many different States. Mass. Rule should stand.

See Hawley *v.* City of Malden, *ubi supra*.

7. The plaintiff contends that the decisions of the Supreme Court of the United States, holding that a State has no right, under the Constitution, to tax one of its inhabitants as the owner of tangible personal property situated in another State, logically should be extended to include intangible property. Plaintiff's Contention.

See Hawley *v.* City of Malden, *ubi supra*.

The plaintiff's contention implies a broader rule as to the taxation of tangible personal property than the decisions of this Court warrant. The plaintiff apparently deduces his rule from the decisions of this Court in cases like Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 194, but the decision in this case has been explained and the correct rule stated by Mr. Justice Lurton in the case of Southern Pacific Co. *v.* Kentucky, 222 U.S. 63.

8. April 22, 1912, this Court in the case of Gromer *v.* Standard Dredging Co., 224 U.S. 362, 376, said: "As a general rule, in the absence of a situs elsewhere, the domicil of the owner is the place where personalty is taxable. As was said in Tappan *v.* Merchants' National Bank, 19 Wall. 490, by Mr. Chief Justice Waite, speaking for the Court Rule as to Tangible Personal Property.

(p. 499): 'Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicil. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court.'"

In order to obtain a taxable situs in a jurisdiction other than that of the domicil of its owner tangible personal property must have become "commingled" or "intermingled" with the property of the taxing authority or "permanently located" there or "incorporated in" the local property of such other jurisdiction.

See Old Dominion Steamship Co. *v.* Virginia, 198 U.S. 299.

Delaware L., etc., R.R. Co. *v.* Pennsylvania, 198 U.S. 341.

Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 194.

Southern Pacific Co. *v.* Kentucky, 222 U.S. 63.

Rule as to Intangible Personal Property.

9. There seems to be no distinction between tangible and intangible personal property, both follow the domicil of the owner, except that in some cases tangible personal property has obtained a permanent situs in some other State by reason of its having become "commingled" or "intermingled" with the property of such other State.

The foundation and general application of the rule, *mobilia sequuntur personam*, is well stated by Mr. Justice Lurton in Southern Pacific Co. *v.* Kentucky, 222 U.S. 63, 68, 69, in the following language: "The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence, and the exception to the principle is based upon the theory that if the owner, by his own act, gives to such prop-

erty a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government. Thus in St. Louis *v.* Ferry Co., 11 Wallace, 423, 430, this Court, after referring to the taxing power of a State as extending to all persons and property within its territorial jurisdiction, said: 'In the eye of the law personal property, for most purposes, has no locality. . . . In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there. Whether the personal property of a resident of one State situate in another can be taxed in the former, is a question which in this case we are not called upon to decide.'"

In the same case the Court lays down the rule (p. 76) that: "The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper situs for purposes of taxation.

"The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been such flag-

rant abuse as may be remedied by some affirmative principle of constitutional law."

Taxation of Shares of Stock of Foreign Corporations.

10. The property taxed in the case at bar is shares of the capital stock of foreign corporations.

Waite, C.J., in Tennessee *v.* Whitworth, 117 U.S. 129, 136, classifies corporation property subject to taxation in the following language: "In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do, it is because the legislature has unmistakably so enacted."

In New Orleans *v.* Houston, 119 U.S. 265, 277, Mr. Justice Matthews said, speaking for the Court: "It is well settled by the decisions of this Court that the property of shareholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, and, where that is the legislative intent clearly expressed, that both may be taxed." This doctrine is fully recognized in Union Refrigerator Transit Co. *v.* Kentucky, *ubi supra*, and in many other cases. There are sound reasons for it in public policy.

In Union Refrigerator Transit Co. *v.* Kentucky, *ubi supra*, Mr. Justice Brown says at page 205: "Respecting this,

there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its situs except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this Court. Tappan *v.* Merchants' National Bank, 19 Wall. 490; Kirtland *v.* Hotchkiss, 100 U.S. 491; Bonaparte *v.* Appeal Tax Court, 104 U.S. 592; Sturges *v.* Carter, 114 U.S. 511; Kidd *v.* Alabama, 188 U.S. 730; Blackstone *v.* Miller, 188 U S. 189."

Mr. Justice Brown at page 206 further states: "The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner."

Mr. Justice Holmes in Kidd *v.* Alabama, 188 U.S. 730, at page 731, said: "If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem to us to have more logical force, although we are far from implying that it would be unanswerable, or that it can be regarded as open. Very likely such taxes can be justified without the

help of fiction. . . . When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the State if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded."

This Court has already held that "certificates of stock of a foreign corporation held by a citizen of Ohio are taxable in that State, though a tax is also imposed on the property of such corporation situated in the State."

Sturges *v.* Carter, 114 U.S. 511.

Note. — In this case the shares of stock in question were shares of stock of the Western Union Telegraph Co., a New York corporation, but owned by a resident of the State of Ohio. The Western Union Telegraph Co. owned some property and paid some taxes thereon to the State of Ohio. The question argued was whether or not the tax upon these shares of stock or a proportionate part thereof came within certain exemptions of the statutes of Ohio. Apparently the question of the constitutionality of such a tax was not argued.

In the case of Dyer *v.* Osborne, 11 R.I. 321, 326, 327, Durfee, C.J., said: "These cases are to the effect that shares in the stock of a corporation are in the nature of choses in action, incorporeal, and have no situs independently of their owner; and that, consequently, the State has jurisdiction over them to tax them by having jurisdiction over their owner, the tax being in fact a tax upon the owner on account of his ownership, rather than upon the shares themselves."

In Bradley *v.* Bauder, 36 Ohio St. 28, 35, it was stated: "The capital of a corporation, whatever invested in, and the individual shares of stock are distinct species of property. Farrington *v.* Tenn., 95 U.S. 679. The owner of a share of stock owns no part of the capital of the company. The corporation is its sole owner, holding the same, it is true, in trust, for the purposes for which the corporation was created,

and upon its winding up, for the benefit of creditors and shareholders. The ownership of a share of stock, so far as the property of the corporation is concerned, is but the ownership of the right to participate, from time to time in the net profits of the business, and upon the dissolution of the corporation to a proportion of the assets after the payment of the corporate debts. It is general property, which, upon the death of the owner, goes to his administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure and, in so doing, works no change or modification in the title to the corporate property. From this it would seem to result necessarily that its situs, for purposes of taxation, when not otherwise provided by statute, is that of the domicile of the owner."

The plaintiff argues that the doctrine of *mobilia sequuntur personam* is a legal fiction and ought not to be applied in the case at bar for the reason that its application will work an injustice. He cites in support of this proposition Mr. Justice Day in Board of Assessors *v.* Comptoir National, 191 U.S. 388, and other United States cases. But Mr. Justice Day was dealing with a case where the property in question had become localized for the purpose of taxation; in other words, had obtained taxable situs in a State other than that of the domicil of the owner.

At pages 402, 403 he says: "It may be taken as a general rule of the law of taxation of personal property that such property can only be taxed at the residence of the owner, or at such place as it has acquired a situs, which will subject it to the taxing power of the State where found. In its application to tangible property, there is little difficulty in applying this principle. The difficulty arises in determining whether a credit or chose in action has acquired a local situs in contemplation of law at a place other than the domicil of the owner in such sense as will permit the State to tax it in the place of its localization. The cases are numerous, both State and Federal, which recognize the right of the State,

in view of the protection and remedial rights which its laws give to the owner of intangible property, such as notes and bills, to require from such property a contribution to the funds of the State, to be collected by taxation, for the purpose of maintaining and enforcing the laws which give force and effect to such obligations."

An examination of the other cases cited by the plaintiff fails to reveal any decision holding that a State has no taxing power when it has jurisdiction of both the property and the person of the owner.

In the case at bar the defendant municipality had jurisdiction of the owner and property itself.

Conclusion.

11. The foregoing authorities, with others therein referred to, seem to justify the defendant in claiming that the statutes of Massachusetts which are the subject of controversy in this case are constitutional for the reasons that: — 1, The doctrine of *mobilia sequuntur personam* for practical reasons applies to shares of stock in foreign corporations for the purposes of taxation; 2, that shares of stock in a foreign corporation are in and of themselves property and as such subject to taxation in the State where the owner thereof resides, such property being bought and sold in the market, generally speaking readily convertible into cash and may be subject to litigation in the courts of the State where the owner thereof resides and otherwise secure the benefit and protection in many ways of the laws of the State in which the owner thereof may reside; 3, the rule against double taxation does not apply, as such rule has always been limited to the double taxation of the same property to the same person, but does not prevent the taxation of property owned by a corporation in one jurisdiction and the taxation of its shares of stock to the owners thereof in another jurisdiction.

The defendant contends that the law, logic, and justice will be best served if the legality of said tax is upheld.

H. L. BOUTWELL,
City Solicitor for Defendant.